UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

IN RE HOLOCAUST VICTIM ASSETS LITIGATION	)))))))	Master Docket No. CV-96-4849 (ERK) (MDG) (Consolidated with CV-96-5161 and CV-97-461)

SETTLEMENT CLASS COUNSEL'S MEMORANDUM IN SUPPORT OF LEAD SETTLEMENT CLASS COUNSEL'S APPLICATION FOR FEES

After dedicating eight years and more than 8,000 hours to the successful implementation of this historic settlement, Lead Settlement Class Counsel Professor Burt Neuborne merits the reasonable fee he has requested. If granted in full, this fee request would result in a cumulative award of fees to all Class Counsel that is less than the modest amount that the original settlement notice indicated might be awarded in the Court's discretion. Whether viewed as a typical fee sought by class counsel in connection with the creation of a common fund, or viewed, alternatively, as an expense of settlement administration, like the fee paid to any of the other Court-appointed administrators, the amount sought is reasonable in light of the scope and quality of the work Professor Neuborne performed to implement a settlement of this size and complexity.

I. THE *GOLDBERGER* FACTORS WEIGH IN FAVOR OF APPROVING LEAD SETTLEMENT CLASS COUNSEL'S PETITION.

It is unclear to what extent the standards applied to the application of counsel seeking a fee upon settlement approval for the creation of a common fund are applicable to the current application by Lead Settlement Class Counsel. Fee applications arising out of the

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creation of the common fund in this case were already filed and evaluated.[1] The current application is essentially a request that an administrator of the settlement be paid for settlement administration services in the normal course. Throughout this settlement's administration, the Court has entertained petitions for compensation and reimbursement by entities and individuals appointed by the Court to assist with settlement administration. Lead settlement class counsel Burt Neuborne was appointed to function in that capacity. Thus, his application is distinct from the earlier round of attorney fee applications arising out of the creation of the original settlement fund.

On the other hand, Professor Neuborne's declaration in support of his fee application describes how his services in connection with settlement administration increased the value of the settlement by a substantial amount well in excess of the fee he now seeks in connection with his administration services; the enhancement in value he contributed during settlement administration is a basis on which the Court may evaluate his fee application as one arising out of the creation of a common fund or common benefit, applying well-established common fund/common benefit principles, discussed below.

Where an attorney succeeds in creating a common fund from which members of a class are compensated for a common injury, the attorney whose efforts created the fund is entitled to a reasonable fee – set by the court – to be taken from the fund. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). When awarding fees under the common fund doctrine, the district court enjoys the discretion to award fees according to either the lodestar or the generally preferred percentage fee methodology. *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d

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[1] For example, Lieff, Cabraser, Heimann & Bernstein, LLP petitioned the Court for an award of fees, which was granted; we donated the fee award to Columbia University Law School to endow a clinical human rights chair. Declaration of Morris A. Ratner in Support of Lead Settlement Class Counsel's Settlement Administration Fee Application ("Ratner Decl."), ¶ 2.

Cir. 2000). Under the lodestar method of calculating a reasonable attorneys' fee, the court must ascertain the number of hours reasonably billed and then multiply that figure by an appropriate hourly rate. *Id.*; *Savoie v. Merch. Bank*, 166 F.3d 456, 460 (2d Cir. 1999). Once that initial computation has been made, the district court may, in its discretion, apply a multiplier based on factors such as the performance of the attorneys. *Savoie*, 166 F.3d at 460. Under the percentage fee approach, the court sets a percentage of the recovery as a fee, usually in the benchmark range of 25 percent, with the amount sometimes being reduced when the size of the fund is exceptionally large. *Goldberger*, 209 F.3d at 47, 51. Under either method, the fees awarded in common fund cases may not exceed what is "reasonable" under the circumstances. *Id.* at 47 (citations omitted). "[N]o matter which method is chosen," district courts within the Second Circuit are required to evaluate the reasonableness of the fee award in relation to six factors enumerated in *Goldberger*. *Id.* at 50. These factors include: (1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations. *Id.* The *Goldberger* factors weigh heavily in favor of Lead Settlement Class Counsel's petition for attorneys' fees. Although it is true that Lead Settlement Class Counsel bore less risk because the fund was already in existence, see Declaration of Robert A. Swift in Opposition to Lead Settlement Class Counsel's Application for Counsel Fees at 5, *In re Holocaust Victim Assets Litigation*, No. CV-96-4849 (E.D.N.Y. Dec. 29, 2005), all of the other *Goldberger* factors support the petition for $4 million as a reasonable fee.

First, Lead Settlement Class Counsel's time and labor expended were monumental. Not only did Lead Settlement Class Counsel spend over 8,000 hours on the settlement implementation, he sacrificed his ability to pursue other professional and academic interests for close to eight years. Second, implementing the $1.25 billion settlement was a complex task, requiring an unusual degree of skill and sophistication (which Professor Neuborne contributed). As commentators noted, the suit was "astonishingly complicated" to coordinate. Joseph Berger, *Creative Counsel*, N.Y.U. L. SCH. MAG., Autumn 2004 at 19. Third, the quality of Lead Settlement Class Counsel's representation cannot be questioned. As this Court observed, Lead Settlement Class Counsel may properly be considered an expert in the field of class actions, with "a wealth of academic expertise and practical experience . . . ." *In re Holocaust Victim Assets Litig.*, 270 F. Supp. 2d 313, 316, 317 (E.D.N.Y. 2002). Fourth, Lead Settlement Class Counsel's requested fee constitutes a miniscule proportion of the total recovery, and far less than the benchmark percentage amount of the value Professor Neuborne added to the settlement during its administration period. Finally, public policy considerations weigh heavily in favor of granting Lead Settlement Class Counsel's petition. Lawyers who dedicate thousands of hours and years of their professional lives to implementing complex but socially significant settlements ought to be duly rewarded in order to encourage similar behavior in other cases. With all but one of the *Goldberger* factors weighing heavily in favor of a $4 million fee award, Lead Settlement Class Counsel's petition is reasonable. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96 (2d Cir. 2005) (approving a fee of $220 million for obtaining $3.05 billion settlement); *Marisol A. ex rel. Forbes v. Giuliani*, 111 F. Supp. 2d 381 (S.D.N.Y. 2000) (awarding $5.6 million in attorneys fees for obtaining injunctive settlement).

II. LEAD SETTLEMENT CLASS COUNSEL PROPERLY DELEGATED SETTLEMENT IMPLEMENTATION TASKS.

Absent evidence of misconduct not present here, experienced and skilled plaintiffs' counsel should not be second guessed about decisions to delegate or not delegate tasks to potentially unprepared or inexperienced assistants. Unless the Court suspects that Counsel is overstaffing the case with "excessive hours expended by multiple high-priced counsel" or has deliberately organized tasks for purposes other than efficiency, the discounting of higher rates for doing work "that should have been performed by associates should be sparingly used because the court is second-guessing the plaintiffs' organization of litigation work." ALBA CONTE, 1 ATTORNEY FEE AWARDS § 4:9 at 463-64 (3d ed. 2004).

A litigator's delegation of tasks should rarely be second-guessed because "utilizing highly skilled individual practitioners may have time-savings benefits. With expert knowledge, a lawyer can go directly to material it might take a junior associate or paralegal many hours to find." *Soc'y for Good Will To Retarded Children, Inc. v. Cuomo*, 574 F. Supp. 994, 1001 (E.D.N.Y. 1983), *vacated on other grounds*, 737 F.2d 1253 (2d Cir. 1984). In *Cuomo*, the court found that plaintiffs' counsel "were able to substantially reduce time expenditures by calling on their extensive experience gained by participating in similar large class actions . . . ." *Id.*

Because it is impossible to tangibly weigh the benefits in efficiency against the savings in cost associated with using less skilled labor, many courts are skeptical of the notion that they are "really in a position to know what type of work is better suited for a senior partner as opposed to an associate[.]" *Muehler v. Land O'Lakes, Inc.*, 617 F. Supp. 1370, 1379 (D. Minn. 1985). That concern is all the more pronounced when the challenge is voiced by co-counsel used to litigating in a private firm that likely provides far more opportunities for delegation than an academic setting. Moreover, it is the undersigned settlement class counsel's experience that Professor Neuborne did in fact delegate where appropriate (for example, seeking assistance from my firm in connection with logistical issues associated with the filing of briefs, and in connection with class action procedural issues as to which we have great familiarity).

Ratner Decl., ¶¶ 3-7.

III. LEAD SETTLEMENT CLASS COUNSEL IS NOT ESTOPPED FROM PETITIONING FOR FEES DUE TO IMPLEMENTATION TASKS.

Merely because Lead Settlement Class Counsel worked *pro bono* while obtaining the $1.25 billion Holocaust settlement, he is not estopped from seeking fees for *implementing* that settlement. Although the objectors' briefs do not mention the term "judicial estoppel," they invoke its specter by arguing that because Lead Settlement Class Counsel agreed to serve *pro bono* during the litigation, he cannot obtain fees for the case's implementation stage. *See* Declaration of Robert A. Swift at 1-2; Objections of Class Members to Request by Lead Settlement Class Counsel for Attorneys Fees and Request for Schedule for Formal Submissions and Hearing at 3-5, *In re Holocaust Victim Assets Litigation*, No. CV-96-4849 (E.D.N.Y. Jan. 13, 2006), Such a claim fundamentally misunderstands the recognized distinction between pre- and post-settlement phases of litigation, and fails to fulfill the requisite elements of judicial estoppel.

The purpose of judicial estoppel is "to protect the integrity of the judicial process." *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001) (quoting *Edwards v. Aetna Life Ins. Co.*, 698 F.2d 595, 598 (6th Cir. 1982)). Several factors inform the decision whether to apply the doctrine in a particular case. First, the party's later position must be "clearly inconsistent" with its earlier position. *Id.* at 750 (citing, *inter alia*, *Maharaj v. Bankamerica Corp.*, 128 F.3d 94, 98 (2d Cir. 1997)). In this case, Lead Settlement Class Counsel's petition for fees for fulfilling settlement implementation tasks is not "clearly inconsistent" with his decision to help obtain the $1.25 fund *pro bono*. Courts routinely distinguish between fees awarded for obtaining a settlement on the one hand, and administering the settlement on the other. *See, e.g.*, *R.C. by Alabama Disabilities Advocacy Program v. Nachman*, 992 F. Supp.

1328, 1332 (M.D. Ala. 1997) (distinguishing pre-settlement and implementation tasks for purposes of attorneys' fees). Indeed, courts have developed a whole line of cases around the awarding of fees for necessary *post-settlement* work. *See, e.g.*, *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 561 (1986) (holding that the district court enjoys the sound discretion to grant an award for services performed that are "useful and of a type ordinarily necessary" to secure the final result obtained from litigation). Thus, courts are frequently asked – and frequently agree – to award post-settlement fees necessary for implementation of a common-fund settlement that are conceptually distinct from any fees awarded for obtaining the settlement. *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 470 (S.D.N.Y. 2004); *In re Painewebber Ltd. P'ships Litig.*, 2002 WL 21787410, *8 (S.D.N.Y. 2003). In this case, Lead Settlement Class Counsel made clear his intention to forego any fees "for having *obtained* the $1.25 billion settlement." Letter from Burt Neuborne to Leo Rechter, President of the National Association of Jewish Holocaust Survivors, 4, July 9, 2002 (emphasis added). But such statements are in no way inconstant with a petition for fees of that settlement's *implementation*.

Second, if a later statement poses no "risk of inconsistent court determinations," then there is little threat to judicial integrity and therefore no basis for imposing judicial estoppel. *New Hampshire*, 532 U.S. at 751 (quotation and citations omitted). It is difficult to see how Lead Settlement Class Counsel's request for fees poses any risk of inconsistent court determinations, or what that would even mean in this context. Awarding Counsel's fees would create no threat to judicial integrity, and the objectors identify none.

Third, the party seeking to assert the allegedly inconsistent position must derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Id.*

Any suggestion that class members would be unfairly harmed by a reasonable compensation for Lead Settlement Class Counsel's time is groundless. Class members were informed at the time the settlement notice was sent out that certain plaintiffs' attorneys would apply for fees up to 1.8% of the settlement fund, and it is obvious that the settlement would have to be administered, as described in the plan of allocation. Nothing about Counsel's petition affects that assurance or threatens to unfairly affect any class member's recovery.

Although the objectors may have hoped that Lead Settlement Class Counsel would perform his implementation duties *pro bono*, their discontent does not amount to judicial estoppel. Nothing about what Counsel said respecting the foregoing of fees during the pre-settlement phase precludes Counsel from obtaining fees for his critical post-settlement work.

IV. NO ADDITIONAL NOTICE TO CLASS MEMBERS IS REQUIRED.

Finally, Lead Settlement Class Counsel has no duty to send out additional notice in order to inform class members or co-counsel of his intention to seek post-settlement fees.[2] *See* Declaration of Robert A. Swift at 2. Class members have a constitutional right to be notified about any settlement of their claims and the corresponding terms, but because class members do not sign individual retainer agreements with their representative attorney, that right is protected by the general notification requirements of Rule 23. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974) (noting the due process function of notice). No Court-approved notice document addressed the identity of Counsel who would apply for such fees; thus class members have no expectation regarding the allocation of any fees awarded by the court among potentially

[2] Mr. Swift cites to the New York Lawyers Code of Professional Responsibility, Canon 2-19 and Disciplinary Rule 2-106 to suggest that professor Neuborne had an obligation to announce to the class that he was seeking a fee in this case associated with his settlement administration work. This is false. When functioning as Lead Settlement Class Counsel, Professor Neuborne did not act on behalf of individual clients with whom he has any type of direct or individual fee agreement or from whom he is seeking any fee; thus the provisions cited by Mr. Swift are inapposite. Rule 23, discussed above, governs the notice obligations in this case.

deserving plaintiffs' counsel.

When the settlement notice describes a percentage-based ceiling to attorneys' fees, as here, the notice is constitutionally sufficient. *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 481 (S.D.N.Y. 1998) (approving a notice stating that "Class Counsel will petition the Court for an award of attorneys' fees, not to exceed 17.5% of the Settlement Fund. . ."). Put simply, there is no justification for the argument that class members' constitutional rights are infringed because they are not informed about the *method* in which that percentage will eventually be divided among the attorneys, or the specific amounts to be awarded to each individual attorney. Class members received sufficient notice about the effect that attorneys' fees would have on the settlement fund, and nothing else is required merely because Lead Settlement Class Counsel has petitioned for post-settlement fees.

No Court has ever held that additional notice to the class would be required under analogous circumstances. On the contrary, logic dictates that the fee amounts that the notice provided in the original notice of settlement would be the only required notice. The notice program in this case was a monumental undertaking. It cost tens of millions of dollars and involved publication, including paid advertising and a public relations program, as well as extensive community outreach. *See* Morris A. Ratner, "The Settlement of Nazi-Era Litigation Through the Executive and Judicial Branches," 20 *Berkeley Journal of International Law* 212 (No. 1, March 2002). If it were required that co-extensive notice be provided of each and every individual fee application provided by each of the firms that functioned as settlement class counsel in this case, at every stage of the application process (i.e. both in connection with fee applications associated with the settlement of the litigation, as well as the subsequent settlement administration fee applications), we would have had to duplicate the original notice, imposing tremendous burdens and inefficiencies, and squandering class members settlement resources.

For all these reasons, the petition of Lead Settlement Class Counsel should be granted in its entirety.

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Respectfully submitted,

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